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No. 92-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

995 FIFTH AVENUE ASSOCIATES, L.P.,

Petitioner,

—v.—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES W. WETZLER, As Commissioner of Taxation and Finance; and EDWARD V. REGAN, As Comptroller of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF L.A. COTTON & CO., INC. AND ITS SOLE SUCCESSOR-IN-INTEREST, LINDA A. GUTERMAN, IN SUPPORT OF PETITIONER

ALVIN M. FEDER
Counsel of Record
450 Seventh Avenue
New York, New York 10123
(212) 239-4610

ROBERT J. KAPLAN
Attorney for Amicus Curiae *LAC*
74 Trinity Place
New York, New York 10016
(212) 964-0600

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1. L.A. Cotton & Co., Inc. and its sole successor-in-interest, Linda A. Guterman (hereafter "LAC") respectfully move the Court for leave to file the within brief *amicus curiae* in support of petitioner. Both petitioner and respondent have declined to grant consent to the filing of this brief.

2. In support of its motion, LAC avers:

3. LAC is a party in interest of petitioner's bankruptcy estate, against which it holds a claim in the approximate amount of $4.8 million. The outcome of this case directly affects LAC, because the point in issue—whether respondent, the State of New York, can retain approximately $2.6 million

that it removed from petitioner's estate in order to pay a "priority" state tax—will affect LAC's ability to have its own claim paid.

4. While LAC recognizes that assumption of *amicus curiae* status at the petition stage is not favored by the Court, it notes that its interest in this case goes beyond that of an ordinary *amicus curiae*. LAC is a party in interest and, as such, it has a statutory right to be heard on any issue arising in petitioner's bankruptcy case, especially an issue such as that presented, which directly affects the matter of payment to LAC. *See*, 11 U.S.C. §1109(b) and *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). Without prejudice to its right to appear as "intervenor", rather than simply *amicus curiae* (*see*, *Marin*, *supra*), LAC respectfully requests that its arguments as *amicus curiae* be heard and considered by the Court.

5. LAC respectfully submits that those arguments will aid the Court in deciding whether to grant *certiorari*, and how thereafter to dispose of the case, because the annexed brief amicus curiae raises crucial constitutional, historical and policy arguments that were overlooked by petitioner. LAC hopes that its brief *amicus curiae* will be of assistance to the Court, and it respectfully moves for leave to file it.

Dated: New York, New York
September 22, 1992

/s/ ALVIN M. FEDER

Alvin M. Feder
450 Seventh Avenue
New York, New York 10123
(212) 239-4610
Counsel of Record
for *Amicus Curiae* LAC

QUESTION PRESENTED

What are the parameters for determining whether a tax is a "stamp tax or similar tax" under 11 U.S.C. § 1146(c)?

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BRIEF *AMICUS CURIAE* OF L.A. COTTON & CO., INC. AND ITS SOLE SUCCESSOR-IN-INTEREST, LINDA A. GUTERMAN, IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

This brief is respectfully submitted on behalf of L.A. Cotton & Co., Inc. and its sole successor-in-interest, Linda A. Guterman ("LAC"). LAC is a creditor of the estate of the debtor-petitioner herein ("995"), against which it holds a claim in the approximate amount of $4.8 million. Payment of the New York tax which is the subject of this case will substantially reduce LAC's ability to receive payment on its claim under 995's confirmed plan of reorganization.

SUMMARY OF THE ARGUMENT

Section 1146(c) of the Bankruptcy Code exempts a Chapter 11 estate from payment of a "stamp tax or similar tax" that is imposed on "the making or delivery of an instrument of transfer under a plan confirmed" under Chapter 11 of the Code. The State of New York imposes a tax on the transfer of real property within its borders. That tax has two components, one of which applies to all such transfers and another which applies only to transfers where the consideration exceeds $1,000,000.

As part of its Chapter 11 reorganization, and pursuant to a Bankruptcy Court order that was designed to effectuate that reorganization, 995 sold real property situated within New York for a sum exceeding $1,000,000. While New York does not dispute that that transfer was exempt from the first component of its transfer tax, it contends that it is not exempt from the second component, which applies to million dollar plus transactions. Neither the first nor the second component of New York's transfer tax requires the use of any tax stamps.

Both the Bankruptcy Court and the District Court held that, as a matter of law,[1] the second component of New York's transfer tax was a "stamp tax or similar tax" under 11 U.S.C. §1146(c), so that 995 would be exempt from that component as well. The Court of Appeals for the Second Circuit reversed that summary judgment, holding that, because the *computational*

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1 It is questionable whether any court, be it the Bankruptcy Court, the District Court or the Court of Appeals, could properly make a "matter of law" determination on the issue of "similarity". This Court has previously held that "similarity", even when that term is simply part of a statute, is a question of fact. *See, Greenleaf v. Goodrich*, 101 U.S. 278 (1879). Irrespective of whether "similarity" is resolved as a question of fact or as a question of law, it is important for the Bankruptcy Court to know what parameters it should be operating under in making a determination of "similarity". As discussed below, the parameters enunciated by the Court of Appeals are not the correct ones. Indeed, were they to be followed, those parameters would undermine federal supremacy and uniformity—free from state interference—in the area of Chapter 11 reorganizations.

attributes of "stamp" taxes differ from the computational attributes of the million dollar plus component of New York's transfer tax, the lower courts' determination of "similarity" was erroneous.

The Court of Appeals' narrow approach to "similarity" is flawed in several respects. First, that court's perception of how stamp taxes are computed is at odds with the most notorious stamp tax in this country's history, the Stamp Act that Great Britain imposed on the thirteen colonies. The Court of Appeals' narrow approach to what constitutes a "similar" tax is also at odds with history, particularly the response that the founders of this country had to the "similar" Townshend Act "duties" that Great Britain employed to replace its objectionable "stamps". Indeed, if the founders of this country had had the same narrow perspective on "similar" taxation that was indulged by the Court of Appeals, our great revolution for independence—prompted in no small measure by Great Britain's imposition of "stamp" and "similar" taxes on the thirteen colonies—might never have occurred.

However, the most serious flaw in the Court of Appeals' reasoning is that that court failed to consider what evil Congress was trying to prevent, and what federal policy it was seeking to promote, by enacting 11 U.S.C. § 1146(c). That policy—to enable federal courts to reorganize bankrupts free from state-specific transaction-oriented taxes which impede reorganization and prevent federal "uniformity" in the area—is undermined by the narrow approach that the Court of Appeals took to the "similar tax" issue. That policy, which is one of constitutional dimension, because it deals with the fundamental allocation of state/federal power in the area of bankruptcy reorganizations, was overlooked by the Court of Appeals.

It is respectfully submitted that this case warrants the attention of this Court and that, upon review, so much of the order and decision of the Court of Appeals as established unduly narrow parameters for resolving the "similar tax" issue should be reversed.

ARGUMENT

THE COURT OF APPEALS' NARROW APPROACH TO "SIMILARITY" JEOPARDIZES CONSTITUTIONAL UNIFORMITY AND FEDERAL SUPREMACY IN THE AREA OF BANKRUPTCY REORGANIZATIONS

Why Did Congress Choose "Stamp" Taxes?

11 U.S.C. § 1146(c) provides:

> "The issuance, transfer or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax."

Neither the Bankruptcy Code nor its legislative history define the terms "stamp tax" or "similar tax" used in this statute. Given that vacuum, the Court of Appeals made its analysis of the attributes of a "stamp tax" by focusing solely on the *computational* aspects of such a tax. Having taken that narrow approach, the Court of Appeals proceeded to find "dissimilarities" between "stamp taxes" and the New York transfer tax in issue.

The error in the approach that the Court of Appeals adopted to the "similarity" issue lay in the fact that nowhere did that court consider what it was about stamp taxes *in particular* that prompted Congress to preclude their being imposed on a transfer that a federal court has deemed necessary to effectuate a Chapter 11 reorganization. Only by first answering *that* question—never addressed by the Court of Appeals—can one proceed to the issue of what Congress intended when it expanded 11 U.S.C. § 1146(c) to include not only "stamp" taxes, but "similar" taxes as well.

As the Court of Appeals noted in a predecessor case involving 11 U.S.C. § 1146(c), there is no doubt that

> "Congress's apparent purpose in enacting section 1146 was to facilitate reorganizations through giving tax relief."

In re Jacoby-Bender, Inc., 758 F.2d 840, 841 (2d Cir. 1985). If, however, Congress' intent was simply to grant across-the-board tax relief to reorganizing debtors, why limit such relief to stamp taxes, as opposed to property taxes or income taxes? The broad statement in *Jacoby-Bender, supra*, simply does not answer the fundamental question: what is it about *stamp taxes* that makes them particularly invidious *in the bankruptcy context*?[2]

Section 1146(c) Is A "Check And Balance" On The Absolute Priority That Section 503(b) Accords State Taxes

The starting point for answering the above question must be the Constitution's recognition, in Article I, Section 8, Clause 4, that the rehabilitation of bankrupts is a matter for federal control. Under the constitutional scheme, such federal control is not limited to companies which have interstate contacts. Congress' power over the affairs of such companies was already implicit in the Commerce Clause of Article I. The Bankruptcy Clause of Article I went beyond that, making it clear that the federal government's power over the rehabilitation of bankrupts is to be supreme in *all* cases and that, where state law threatens to impede the effectuation of a federally-sponsored plan of reorganization, the state must yield.

Having been endowed with such supremacy, Congress could, in the interest of debtor rehabilitation, have placed a state's tax claims against a bankrupt on an equal footing with those of his private creditors. Such "equal footing" would facilitate reorganizations, because, if a state could not "take first", there would be more to share among the bankrupt's private creditors, thereby increasing the likelihood that the debtor could formulate a reorganization plan that would meet with those creditors' approval. Congress, however, decided to be more generous with the states than it had

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2 What constitutes a "stamp tax" in the non-bankruptcy context (*e.g.*, *Lee v. Bickell*, 292 U.S. 415 (1934) may be illuminating, but it is hardly dispositive of the issue at bar, because Section 1146(c) also applies to "similar tax". Only when one determines what peculiar threat stamp taxes pose to *bankruptcy reorganizations* can one then determine what types of non-stamp taxes are likewise proscribed by Congress' "similar tax" language.

to, and it accorded them a great boon: absolute "priority" for state tax claims under 11 U.S.C. § 503(b)(1)(B).

The priority that subdivision (B) of 11 U.S.C. § 503(b)(1) accords state taxes is *absolute*. Unlike subdivision (A) of Section 503(b)(1), a state tax does not have to meet the "preserving the estate" test in order to qualify for priority treatment as an administrative expense.

As this Court noted in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), "the power to tax involves the power to destroy". If Congress left the absolute priority accorded by subdivision (B) of 11 U.S.C. § 503(b)(1) totally unchecked, there would be nothing to prevent a state from imposing a tax that could gobble up a bankrupt's estate in a manner that would hamper its ability to effect a reorganization. Control over bankruptcies, which the Constitution removed from the states to the federal government, could, through the device of unchecked "priority" taxation, effectively revert to the states, who, by simply imposing a tax, could hold the power of life and death over a bankrupt's reorganization.

It is apparent that Section 1146(c) was designed as a "check and balance" upon the absolute priority of state taxes. Section 1146(c) checks the states' ability to tax particular *transactions*. Because, when a state taxes *the very transaction that a federal court has deemed necessary to effectuate a plan of reorganization*, such tax impedes federal supremacy in the reorganization area. Such a tax cannot be given priority. Indeed, under Section 1146(c), such a tax cannot be imposed at all.

The invidiousness of "stamp taxes" lies in the fact that, traditionally, such taxes have been used to tax the ability to *engage in particular transactions*. Unlike income taxes, which tax the conduct or income of a taxpayer *as a whole*, and unlike property taxes, which tax property irrespective of what *transactional* use has been made of it, a stamp tax imposes its burden *on particular transactions*.

When, as in the case of a stamp tax, a transaction is, *by itself and irrespective of other conduct by the taxpayer*, made subject to

state taxation, the state has the power to prevent, discourage or impede such transaction.[3] When the *transaction* adversely affected by such *state* taxation is one that a *federal* bankruptcy court deems necessary to a federally-sponsored plan of reorganization, constitutional supremacy demands that the state yield. Yielding on such a point is easily accomplished, because that which Congress has given it can freely take away. In Section 503(b)(1)(B), Congress gave the states general priority in bankruptcy when it comes to their taxes. In Section 1146(c), Congress tempered that priority with a specific exclusion for *transaction*-oriented taxes, such as "stamp" taxes or "similar" transaction-oriented taxes.

The Court Of Appeals' Narrow Approach To "Similarity" Misfocused On Computations Rather Than On Constitutional And Federal Policy Considerations

Once one recognizes the underlying constitutional federal-state tension which made it inevitable that state taxation of *transactions* necessary to effectuate a federally-sponsored reorganization would have to be exempted from the priority accorded by Section 503(b)(1)(B), it is easy to comprehend why Congress expanded Section 1146(c) to include not only "stamp" taxes, but "similar" taxes as well. Without such broad language, "stamp tax" could be read literally, rather than in its constitutional *policy* context, thereby jeopardizing that constitutional policy. Without the "similar tax" language, all a state would have to do in order to avoid the policy against impeding transactions necessary to a federally-approved reorganization with a transaction-oriented tax would be to impose such a tax without requiring "stamps".

Unfortunately, in adopting the narrow approach to "similarity" that it did in this case, the Court of Appeals replaced the evil that would flow from a *literal* interpretation of "stamp tax" with an equally destructive *stilted* interpretation of the "simi-

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3 New York uses the transfer tax in issue in such a "coercive" manner. Thus, New York does not allow a deed for transferred real property to be recorded unless that transaction-oriented tax is first paid. *See*, N.Y. Tax Law § 1447(1)(f).

lar tax" language. In assessing whether the transaction-oriented tax imposed by New York State was a "similar tax", the Court of Appeals narrowly focused only on those attributes of "stamp taxes" *which bear no relationship to the policy behind Section 1146(c)*. The Court of Appeals did not focus on *why* Congress had decided to treat "stamp" taxes differently, nor *why* it was necessary to expand such special treatment to "similar" taxes. The Court of Appeals simply assumed that Congress had *arbitrarily* decided to give a bankrupt relief from stamp taxes, without looking to see what evil Congress was trying to prevent by doing so. As noted above, that "evil" is the fact that a stamp tax—being a transaction-oriented tax—upsets the ability to reorganize a financially distressed company, because it taxes (and therefore impedes or, at the very least, makes less desirable) the very transaction that a federal court has deemed necessary to effectuate such a reorganization.

That the Court of Appeals misfocused on attributes of a "stamp tax" that have nothing do with the policy behind Section 1146(c) is clear from its preoccupation with the "dissimilarity" between the "high" rate of New York's transaction-oriented tax and the "low" rate that, according to that court, stamp taxes supposedly have. This "dissimilarity" has nothing to do with the policy behind Section 1146(c). Indeed, if anything, a high transaction-oriented state tax is *more* destructive of the ability to implement a federal reorganization than a low one.

The Court Of Appeals' "Computational" Approach Is Irreconcilable With History

Moreover, the Court of Appeals' view that stamp taxes are not "high" taxes was arbitrary and irreconcilable with history. Thus, in analyzing what it deemed to be the attributes of a stamp tax, the Court of Appeals skipped over that stamp tax which is the most notorious one in our history, namely, the Stamp Act that Great Britain imposed on the thirteen colonies. That stamp tax is analyzed, in detail, in Knollenberg, *Growth of the American Revolution 1766-1775* (Free Press, 1975). As noted in that treatise, the

stamp tax that the Stamp Act imposed on advertisements in Benjamin Franklin's *Pennsylvania Gazette* amounted to around 80% of that publication's advertising revenue and 70% of its subscription revenue. *Id.* at 49 and at 305, nn. 12 and 13. With respect to the *Boston Chronicle*, the same stamp tax amounted to about 86% of that publication's price. *Id.* at 305, n. 14. With respect to the *Astronomical Diary*, the impact was even worse—the stamp tax amounted to twice the cost of that publication. *Id.* at 305, n. 15. It is to state the obvious that such stamp taxes were not "low".

The Stamp Act also demonstrates the mistake in the Court of Appeals' view that stamp taxes must be based on the "consideration for" or "value" of a particular transaction. The *varying* impacts of stamp taxes on the aforesaid colonial publications were due to the fact that the Stamp Act was not directed at the amount of consideration paid, or value involved, but, rather, on particular "transactions" *irrespective of their monetary amount*. Thus, among the several transactions that it taxed, the Stamp Act taxed the transaction of "using paper". Accordingly, even if the *Pennsylvania Gazette* and the *Boston Chronicle* paid different amounts to purchase the paper that they used, they nevertheless paid the same stamp tax for each sheet that they used, because "consideration" and "value" were irrelevant. And if, as in the case of the *Astronomical Diary*, paper was used to print an "almanac", the stamp tax on such "using paper" was different, even if *Astronomical Diary* paid the same "consideration" for its paper as did the *Pennsylvania Gazette* and the *Boston Chronicle*.

The Court of Appeals' preoccupation with "how is the amount of tax computed?", as opposed to "is a particular transaction being taxed?", renders its opinion fundamentally flawed. There is no way to prescribe a "uniform rule", such as "low percentage of total consideration paid", for determining what is or is not a stamp or similar tax. Because, as noted above, it is perfectly possible for the computation of a stamp tax to have *nothing* to do with "consideration paid". The common thread which runs through all stamp taxes is not how they are computed, but what they tax. If the tax is directed at a particular

type of transaction, as opposed to the activities of a taxpayer *as a whole*, then it is a tax "similar" to a stamp tax.

On the issue of what kind of tax is "similar" to a stamp tax, the Court of Appeals overlooked yet another key event in American history. After the colonists objected to the Stamp Act, England replaced it with the Townshend Act. The Townshend Act involved no "stamps". Nor was it *directly* assessed against transactions engaged in by the colonists. Instead, under the Townshend Act, England levied a duty on the importation of various items into the colonies, many of which corresponded to ones whose use had previously been subjected to the purchase of stamps under the Stamp Act.

The Farmer's Letters, a series of colonial essays which has been described as having

> "an influence beyond that of any other political writing in the Revolutionary period except Paine's *Common Sense*,"

(*Growth of the American Revolution, supra*, at 49), attacked the Townshend Act on the ground that "names will not change the nature of things" (*Id.* at 51), and that, since the ultimate economic effect of the Townshend Act's "duties" was the same as the Stamp Act's "stamps" (*i.e.*, to tax the colonists for engaging in certain transactions), it was equally objectionable.

The observation that "names will not change the nature of things" is as meaningful in analyzing the concept of "similar" tax today as it was in assessing the similarity between the Townshend Act and the Stamp Act more than two centuries ago. If New York required persons to buy tax "stamps" in order to engage in the transaction of transferring a parcel of real property, there is no doubt that such a transaction-oriented tax would fall within 11 U.S.C. § 1146(c). It would not matter how the amount of "stamps" to be purchased would be calculated (*e.g.*, on the total consideration paid, on a fraction of the consideration paid, on the amount of square feet in the property, etc.), because the fact would remain that what was being taxed was that a particular type of transaction had been engaged in. Now, what if the state abolished the need to buy "stamps", but

simply assessed a tax for engaging in the same type of transaction. Would that not be a "similar" tax?

Why then is the tax in issue not a "similar" tax? The target of that tax—engaging in a particular type of transaction—is no different than the target of a stamp tax. The economic effect of that tax—making it prohibitive to engage in a particular type of transaction—is no different from that of a stamp tax. Where then is the "dissimilarity"? In how the amount of tax is computed? But, as noted above, no "uniform rule" can be found in that regard when it comes to stamp taxes.

The Court of Appeals' "Computational" Approach Is Otherwise Flawed

Because the matter of how the amount of tax is computed is irrelevant to the issue of whether a particular tax is "similar" to a stamp tax, the Court of Appeals' attempt to paint the tax in issue as being "dissimilar", because its amount is computed by looking only to a *portion* of the consideration paid, is flawed. The Court of Appeals held that, since, in its view, stamp taxes are always based on a percentage of *total* consideration paid, the fact that New York calculates its tax on only *part* of that consideration renders that transaction-oriented tax "dissimilar". Initially, we note that this purported "dissimilarity" is at odds with the other one that the Court of Appeals misfocused on. On the one hand, the Court of Appeals insisted that a "similar" tax must be "low". On the other hand, that court insists that such a tax must be computed as a percentage of the whole, rather than only a part—a mode of calculation that is bound to yield a higher, rather than a lower, rate.

That the "part" of consideration that New York looks to in order to compute the amount due under its transaction-oriented tax is called "gain" by that state does not change this flaw in the Court of Appeals' reasoning. As the District Court in this case noted, the word "gain" as used in New York's transaction-oriented tax law is a misnomer. New York's arbitrary definition of "gain" does not reflect true economic gain or loss. 127 B.R. at 541. Indeed, depending on the amount of "soft costs" that an owner of real property incurs in effecting its sale (costs that are

disregarded under New York's arbitrary definition of "gain"), the tax in issue can end up being imposed on the transaction of transferring property even though such transaction results in economic loss. *See*, Note, *Real Property Taxation*, 35 Syracuse L. Rev. 609, 613-15 (1984).

"Names will not change the nature of things." Despite its misleading reference to "gain", the tax in issue does not tax *income*. It taxes a *transaction*. When true gain is generated by a sale of real property, New York taxes it under its state income tax law (N.Y. Tax Law, Art. 22), a law that does not tax individual transactions, but, rather, taxes the taxpayer *as a whole*. The tax in issue taxes a particular transaction—the transfer of real property—as an isolated event.

The manner in which New York requires the tax in issue to be reported leaves no doubt that it is a transaction-oriented tax. Thus, New York's taxation of the transaction of transferring real property has two components: a "base" tax on such transfer and a "surcharge" tax on such transaction. The "base" tax applies to all transfers of real property and is calculated as a percentage of the total amount of consideration paid. *See*, N.Y. Tax Law § 1402. The "surcharge" applies only to those transactions where the total consideration exceeds $1,000,000. In such cases, the amount of the surcharge is calculated as a percentage of only part of the consideration for the transfer, *i.e.*, that part which meets the state's arbitrary definition of "gain".[4] As noted above, New York's arbitrary definition of "gain" bears no relationship to true economic gain. Rather, it is simply a "formula"—no different than if the state said that it was only surcharging the first five million dollars of the total consideration, or only the second five million dollar increment of such consideration, etc.

That the amount of transaction-oriented tax that is calculated by using this computational "gain formula" is nothing more

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4 This "part of consideration" formula for million dollar plus transactions applies only to non-residential real property. *See*, N.Y. Tax Law § 1443(2). When it comes to residential property, a "total consideration" formula is used for imposing a surcharge on million dollar plus transactions. *See*, N.Y. Tax Law § 1402-a.

than a "surcharge" on a "base" tax is obvious from section 1409(d) of New York's Tax Law. That section requires the "gain formula" component of the transfer tax to be reported *on the same return form* as the "base" component of that tax. The "surcharge" nature of the "gain formula" tax could not be clearer.

Given the Court of Appeals' determination, in a prior case, that the transfer tax imposed by the *City* of New York (which is indistinguishable from the aforesaid "base" component of the *State* of New York's transfer tax) is within the "similar tax" exemption of 11 U.S.C. § 1146(c) (*see, Jacoby-Bender, supra*), that court's subsequent refusal to accord similar treatment to the "surcharge" component of that tax—simply because it is computed differently from the "base" tax—is untenable.

The reorganization of a company in bankruptcy oftentimes requires a transfer of property. Once a federal bankruptcy court determines that such a transfer should be made, a state is not free to impede the effectuation of that federal scheme by taxing *the very transaction that the federal court has decreed.* Irrespective of whether such a transaction-oriented tax involves the use of stamps, its imposition is barred by Section 1146(c). Irrespective of whether such a transaction-oriented tax is a "base" tax or a "surcharge" tax, its imposition is barred by Section 1146(c). Just as it is irrelevant to a transaction-oriented tax which involves the use of stamps how the amount of tax is computed, so, too, it is irrelevant to *any* transaction-oriented tax how its amount is computed. If the tax targets a transaction, as opposed to the taxpayer as a whole, it is a "similar" tax within the meaning of 1146(c).

The Tax In Issue Jeopardizes Federal Supremacy And Uniformity In The Area Of Bankruptcy Reorganizations

That the tax in issue, by virtue of its transaction-oriented nature, places an undue burden on federally-supervised reorganizations is apparent from a decision by New York's highest court which was rendered *after* the Court of Appeals' decision herein. In *Matter of Morgan Guaranty Trust Company of New*

York v. Tax Appeals Tribunal of the New York State Department of Taxation and Finance, ____ N.Y.2d ____, 1992 N.Y. Lexis 1595 (June 9, 1992), New York's highest court was confronted with the issue of whether the "gain" tax in issue, although one of "general application", nevertheless places such an undue burden on ERISA plans as to be preempted by ERISA. It held that it did. New York's highest court held that the impact that the "gain" tax in issue has on a property owner's investment strategies (*e.g.*, what to buy and sell) and on the depletion of such owner's assets (by taking a direct bite out of the proceeds of their transfer) is such that it unduly interferes with the federal scheme of "uniformity" mandated by ERISA.

The policy considerations are no different when one considers the "uniformity" in federal control that is mandated by the Bankruptcy Clause of the Constitution. Like the administrator of an ERISA Plan, a federal bankruptcy court is charged with the duty of supervising and approving transfers of property that are necessary to a bankrupt's reorganization. Moreover, just as the assets of an ERISA Plan are held in trust for its beneficiaries, so, too, the assets of a bankrupt's estate are held in trust for its *pre-existing* creditors. When a state purports to create a *new* "priority" claim upon those assets—by taxing the very transaction that a federal court has ordered to reorganize the bankrupt, so that its previous creditors can be paid—the state depletes that trust fund. Moreover, by injecting a state-specific, transaction-oriented tax into the "reorganization equation", the state requires the federal court to make its "investment strategies" regarding reorganization (*e.g.*, what property of the bankrupt should be sold) in a non-uniform manner. A federal judge dealing with property of a bankrupt in a state that has a transaction-oriented tax will have to handle his or her reorganization of the bankrupt in a manner different from that of a federal judge dealing with identical property of a bankrupt in a jurisdiction that does not have such a transaction-oriented tax.

New York's highest court has held that the burdens and non-uniformity that the "gain" tax in issue places on the federal ERISA scheme warrant preemption of that state tax. We respectfully sub-

mit that the apparent policy behind Section 1146(c) warrants a like result in this case. The tax in issue is "similar" to a stamp tax *in those ways that matter*. Its purpose is "similar"—to tax isolated transactions, rather than the taxpayer as a whole. And its deleterious effect on the federal scheme is "similar"—it impairs federal "uniformity", directly depletes the assets of a federally-supervised estate, and makes federal formulation of an effective plan of reorganization that much harder.

The Court of Appeals' decision in this case is an invitation to states and municipalities to abuse the priority that 11 U.S.C. § 503(b)(1)(B) accords them, and wreak havoc upon bankruptcy reorganizations, by simply enacting a transaction-oriented tax that (i) does not entail the use of "stamps", (ii) imposes a "high" rate of taxation, and (iii) employs artificial "gains" formulas (or other "part of consideration" formulas), and then use such "priority" tax to gobble up the proceeds of a transfer that a federal court has decided is necessary for a bankrupt's reorganization. This loophole to the important policy underlying Section 1146(c) should be closed by this Court.

The closing of this loophole is of national importance even if the other circuits decline to follow the narrow test of "similarity" that the Second Circuit employed in this case. Even if that test were to be confined to the Second Circuit, the burden on the constitutional scheme would be too great. The Constitution removed control over the rehabilitation of bankrupts from the states to the federal government. To let even one federal court allow even one state to reverse that process, and exercise state taxing power over a federally-decreed transfer-in-aid-of-reorganization, is a situation that is constitutionally intolerable. Cf. *McCulloch v. Maryland, supra.*

CONCLUSION

It is respectfully submitted that this Court should grant certiorari review in this case and that, upon such review, so much of the order and decision of the Court of Appeals as took a narrow approach to the "similar tax" issue should be reversed.

Respectfully submitted,

ALVIN M. FEDER
Counsel of Record

On the brief:

ROBERT J. KAPLAN

RECORD PRESS, INC., 157 Chambers Street, N.Y. 10007 (212) 619-4949

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